No. 20195

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE WEBB, JR., MARGUERITE R. WEBB, RICHARDS MATTHEWS, JR., ROBERT RUFI and EUGENE C. JONES,

Appellants,

vs.

BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION, FEDERAL HOME LOAN BANK BOARD, LYTTON FINANCIAL CORPORATION, BART LYTTON, BETH LYTTON, THOMAS W. CLARKE, DR. SAMUEL J. SILLS, GLENN WILSON and H. P. BRAMAN,

Appellees.

Reply Brief of Appellants Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert Rufi and Eugene C. Jones.

POLLOCK & DEUTZ,
JOHN P. POLLOCK,
MAX F. DEUTZ,

612 South Flower,
Suite 812,
Los Angeles, Calif. 90017,

Attorneys for Appellants.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 20195

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE WEBB, JR., MARGUERITE R. WEBB, RICHARDS MATTHEWS, JR., ROBERT RUFI and EUGENE C. JONES,
Appellants,

vs.

BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION, FEDERAL HOME LOAN BANK BOARD, LYTTON FINANCIAL CORPORATION, BART LYTTON, BETH LYTTON, THOMAS W. CLARKE, DR. SAMUEL J. SILLS, GLENN WILSON and H. P. BRAMAN,
Appellees.

Reply Brief of Appellants Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert Rufi and Eugene C. Jones.

Supplementary Factual Statement.

Generally.

Due to certain of the statements made in the Briefs filed by the appellees, particularly the Federal Home Loan Bank Board, certain comments are necessary to place this case in its proper perspective.

In the Bank Board brief at page 2, the recital is made that the individual appellants were given notice of the resolutions of the Bank Board and given thirty days to correct their violation of law. Appendix A to

the Bank Board brief shows that notice is to be given to the association and *"Such Association* shall have thirty days within which to correct the alleged violation of law . . ." (Emphasis added.) Section 1464-(d)(1) of Title 12 U.S.C., makes no reference to proceedings by or against individuals.

Indispensability of Parties.

At page 3 (including the footnote), counsel for the Bank Board takes out of context and misstates the content of certain pleadings. The Bank Board's Motion to Dismiss, which *forced* the association to join the Lyttons and the Webbs, stated as its *first* ground the indispensability of parties. [Tr. p. 5.] In the alternative, dismissal was asked for failure to join interested and necessary parties. Finally, as a last alternative, the Board contended that the original complaint did not present the entire controversy. The appellees believe that the thrust of this entire Motion to Dismiss was the "indispensability of parties" and that the association would never have brought the Lytton and Webb defendants into the action except by being forced to do so on this ground. Now the Bank Board, having forced the association to join both the Lyttons and the Webbs, has participated in the dismissal of the Lyttons while at the same time it attempts to maintain the action against the Webbs. Having forced the naming of the Webbs as indispensable parties, they should now be estopped to deny that indispensability.

Essence of Original Amended Complaint.

Also at page 3 of the Bank Board brief (and again at p. 10) the Board says the association incorporated the Board resolutions in the Amended Complaint. This was true, however, only in regard to the

controversy between the association and the Board. [Tr. p. 39, Amended Complaint par. XI.] The charges in the resolutions were never alleged as against the appellants by the association. A reading of the pleading makes this abundantly clear.

In paragraph XII [Tr. p. 40] the association alleged:

> "Said defendants, other than defendant Board, are parties who have a joint interest with plaintiff. It does not appear, however, that they have any standing to initiate an action pursuant to 12 U.S.C. §1464(d)(1) as parties plaintiff. They are, therefore, joined as parties defendant, subject to the authority of the court to treat them as plaintiffs or defendants as may become appropriate in the conduct of this litigation."

While the prayer of the Amended Complaint [Tr. p. 41] does ask for adjudication of the rights and obligations of the parties, this is simply the usual prayer for declaratory judgment, and it would be completely out of text to imply, as appellees do, that the association was asking, or suggesting, any relief against appellants. The whole complaint is directed against the Bank Board.

Jurisdiction.

At page 4 of the Bank Board brief, some irrelevant remarks are made to the effect that the appellants did not move to dismiss for lack of jurisdiction. This allegation is pointless unless waiver is contended. In any case, jurisdiction is not a matter that can be waived and failure to raise the question at that time (after the initial pleadings) does not preclude the question

being raised later, even on appeal. On a now pending motion on the Second Amended and Supplemental Complaint, this issue is being raised in the District Court on the grounds that the Association could not join the Webb defendants in their litigation because (1) there was no authority therefor under 12 U.S.C.A. 1463(d)-(1), (2) there is no federal question, (3) there is no diversity of citizenship, and (4) there could be no pendent jurisdiction as to the Webbs because the federal law cause of action is against the Bank Board and the state law cause of action is against the Webbs. Therefore, there is no dual statement of federal and state causes of action against the same defendant arising out of a single claim as required by the rules on pendent jurisdiction set forth in the case of *Hurn v. Oursler* (1933), 289 U.S. 238, 58 S. Ct. 586, 77 L. Ed. 1148.

Participation in Discovery.

At page 5 of the Bank Board brief, reference is made to the marked absence of appellants in discovery proceedings. This is misleading because all parties understood that as the association and the present appellants had common interests and as the association had Washington, D.C. counsel conducting the discovery, participation by Webb's attorneys would be unnecessary and costly duplication. No lack of interest on Webb's part can, or should be, implied from the fact that the association assumed this burden in the common interests of the association, the Lyttons and the Webbs.

Settlement Never Approved.

At page 6, the Bank Board says that Judge Whelan approved the settlement. He expressly refused to do so

[Tr. Vol. I, p. 22, *et seq.*, Vol. II, p. 41], and said he would go no further than to approve the Order of Dismissal.

There Were No Attempted Prior "Sales".

At page 7 of the Bank Board brief, the Bank Board misquotes the deposition of Eugene Webb, Jr. (this deposition is not a part of the record) by stating that he had attempted to sell the association to others prior to this transaction. This is a gross misstatement of fact. Webb testified on deposition that he had tried to *transfer control* of Beverly Hills to competent management so that he could retire and that he had tried to sell the Southland Company. He further related that in seeking transfer of control he had attempted to have the Bank Board approve a conversion of Beverly Hills (the association) to a stock company that could be sold to a holding company. However, such a conversion and sale would have called for pro rata distribution of the assets to the depositors and in no way contemplated a profit to Webb, except as a depositor. There was never any contemplated "sale" in the sense implied by the Bank Board brief.

Bank Board Examiners.

At page 14, the Bank Board implies that Bank examiners *were not* present at all times. It is true that appellants' counsel stated on motion in the court below that the examiner was a Mr. Spencer. As to this, it appears in the affidavits filed by the Bank Board that appellants were in error. The affidavit does not deny, however, that there were examiners present at all times, as alleged, though one of these examiners may have been misidentified as Spencer.

Corporate Opportunity.

At page 15 of the Bank Board brief there is a reference to Appendix C and the contention that a federal association could perform certain escrow functions. This is purely irrelevant because the Webb defendants have never been accused of taking advantage of a corporate opportunity of the association in the sale of Southland, and in fact Chairman McMurray of the Federal Home Loan Bank Board expressly disclaimed such a charge. [McMurray Depo. p. 29.]

Purported Justification for Secrecy.

The appellees attempt to justify the secrecy in ordering the dismissal in this case on the basis that there was danger of a run on the savings and loan association. It is highly unlikely that such a run would take place simply because a lawsuit was settled and an escrow company bought by the association. Appellants believe that the real reason for the secrecy was that the appellants would have forced the disclosure of all the facts involved in the settlement and that such facts could not stand the light of publicity.

Nevertheless, the appellees were successful in obtaining the dismissal by presenting a stipulation which withheld many of the key facts of the settlement and failed to disclose the real transaction.

Qualifications of Directors.

The Bank Board brief goes to great length to discuss the qualifications of the directors collected by the Bank Board and placed in office pursuant to the exer-

cise of proxies. At no time have the appellants challenged the *qualifications* of these directors. What appellants have tried to emphasize is the fact that the record is clear that an attempt was made to get the case dismissed based upon a stipulation by the Lytton controlled Board of Directors of the Association. Only after the Court raised the issue of conflict of interests between the Lyttons being both plaintiffs and defendants in the settlement did the parties go out at an adjournment of the court proceedings and obtained the new Board. Presumably, Preston Silbaugh had already been selected as Executive Officer, as he was available in Los Angeles at the time instead of being at his then place of employment in Chile. Director Spencer, however, learned of his selection on the evening of adjournment [McMurray Depo. p. 121] (the court proceedings ended somewhere after 5:00 o'clock on a Thursday and resumed the next morning at 9:00 A.M.) and summarily resigned from employment from the Federal Home Loan Bank Board. There has been no evidence as to when directors Boyko, Breslin and Webb were first contacted, but the McMurray deposition indicates they were gathered together the evening of the first day in court and stayed up all night until 5:30 A.M. in the morning to get the document signed. If this Board had been selected in advance and apprised of the proposed settlement, the parties would hardly have had to work all night to approve a previously agreed to settlement. In fact, it is reasonable to assume that they would have been the parties to have executed

the original settlement agreement. As it turned out, the only document signed by any new member of the association Board was the Covenant Not to Sue signed by Preston Silbaugh. All the other documents were signed by counsel for the parties, who were not substituted or changed during the overnight adjournment. The obvious conclusion therefore, as supported by the rather vague testimony of Chairman McMurray of the events of Thursday night, is that the Bank Board had to work from the adjournment of court on Thursday until 5:30 A.M. on Friday morning in order to get the new Board of Directors together, give them some sort of a briefing, and obtain a resolution authorizing the settlement.

Reich v. Webb.

At page 15 of the Bank Board brief, the Bank Board attempts to attach some significance to *Reich v. Webb,* 336 F. 2d 153 (9th Cir. 1964). The issues raised and decided there have no relevancy to these proceedings. Subject matter jurisdiction, which cannot be waived, hase never been raised or determined, *Reich v. Webb* notwithstanding, because of the particular context of that appeal brought by attempted intervenors. This Court stated that the Bank Board had certain broad powers to obtain relief sought by the intervenors. The question of how these powers were to be specifically invoked was never a question before this Court. In the motions presently pending in the court below, the appellants have pointed out at some length that while the Bank Board had the powers to obtain

the relief sought by the intervenors they failed to exercise those powers in the manner provided by law. Title 12, U.S.C.A. Section 1464(d)(1), provides for action only between an association and the Bank Board. No authority can be found in that section for an action against individuals brought directly by the Bank Board. There is, however, another Section of 1464 (1464 (f)(1)) which does permit direct action against individuals by the appointment of a conservator or receiver for the association (a remedy likely to be used only where the association refuses to bring the action itself) where the Bank Board would step into the shoes of the association and exercise all statutory and common law remedies and pursue all causes of action that might be available to the association. For some reason, this legally authorized procedure was never used by the Bank Board. All of the parties to this litigation have exhaustively researched all litigation in which the Federal Home Loan Bank Board has been involved, and appellants have been unable to find, and appellees have failed to cite, a single case where the Bank Board has brought suit against individuals directly and in its own name.

LEGAL AUTHORITIES CITED.

I.

It Was Improper for the Court Below to Dismiss All but One of the Alleged Co-conspirators Without Dismissing the Remaining Alleged Conspirator.

The briefs of the appellees raise no new case authority, and despite the attack of the Bank Board on the authorities cited by the appellants, we submit that the lengthy dissection of the facts of these cases fails to disturb the basic legal concepts asserted. For example, the Bank Board spends considerable time discussing the facts of *Keppleman v. Upton,* 84 F. Supp. 478, cited by appellants. However, it appears to be immaterial *why* the co-defendants were dismissed. The fact is that, once they were dismissed, a single defendant remained and the court rightly held that he should be dismissed where charged with conspiracy. The *Keppleman* case said that the court could not entertain a cause of action against military personnel. It did not say that the plaintiff was foreclosed from proving that they were conspirators, although they might be unnamed as defendants.

Despite the involved facts of the *Reitmiester v. Reitmiester* and *Elliott v. Paramount Film Distributing Corporation* cases, those cases did in fact hold that a sole remaining alleged conspirator must be dismissed where the prior alleged conspirators had already been dismissed from the action.

The Bank Board does cite *Broadway & Ninety-Sixth Street Realty Corporation v. Loew's, Inc.,* 23 F.R.D. 9 (D.C., S.D., N.Y. 1958) and *Southern Electric Generating Company v. Allen Bradley Company,* 30 F.R.D. 135 (D.C., S.D., N.Y. 1962) where the District Court in each case held that it was proper to dismiss part of the defendants in anti-trust litigation while not dismissing the remaining defendants. Those cases, however, are distinguishable here because in each of these cases more than one alleged conspirator remained in the action. Neither of those cases involved dismissals reducing the case to a *single* remaining alleged *conspirator defendant.* This, appellants contend, is the basic distinction between the cases cited by appellants and those cited by the appellees. In each of the cases cited by the appellants the dismissal was on the basis that there was a single remaining alleged conspirator as defendant and that as that alleged single conspirator could not conspire with himself, the action had to be dismissed as to him.

II.

It Was Improper to Conduct Clandestine Court Proceedings Where the Alleged Co-conspirators Were Dismissed in Utmost Secrecy and With No Notice to the Remaining Defendants.

All of the appellees have carefully avoided discussion of this very touchy subject except a brief reference in one brief to the necessity for secrecy. As we have heretofore pointed out under the Supplementary Factual Statement, we believe the reason given for secrecy

is not the real one. A run on the association, or financial damage to the association, by reason of disclosure of the settlement as to the Lyttons was unlikely, particularly in light of the publicity whitewash given the Lytton operation of the association. [See McMurray Depo. p. 190.]

What the parties were really afraid of was that the Webb defendants would force disclosure of the entire transaction, part of which was illegal and *ultra vires* on the part of the association's officers. (See pp. 5 and 19 of Appellants' Opening Brief and pp. 194 *et seq.* of the McMurray deposition where he discussed the authority for associations to acquire other companies such as Southland and revealed that (1) the enabling resolution of the Bank Board authorizing such acquisition had not been passed (p. 195), and (2) that the Beverly Hills charter had not been amended to permit such an acquisition (p. 196, *et seq.*)).

There is no denial that the hearing was conducted in utmost secrecy (and the record is clear on this point) with the reporter's notes sealed until after the press release.

These appellants were denied any opportunity to be heard at that time to urge the points now raised on this appeal, or, as shareholders of Beverly Hills, to force disclosure of the facts to stop an illegal and *ultra vires* transaction as well as the misuse of the association's assets in buying out the Lytton control of Beverly Hills. The fact that appellants later had a hear-

ing on a Motion to Vacate was no satisfactory substitute when the transaction of sale back of the dismissal was already a *fait accompli.*

It is submitted that such conduct on the part of counsel and the court below merits the dissapproval of this Court.

Suggestion as to Jurisdiction.

While the appellants have not stated as points on appeal the question of the jurisdiction of the court below to entertain the basic action, they have made certain motions on that ground to the court below on the now pending Second Amended and Supplemental Complaint.

The appellees themselves have raised the question of alleged failure to file motions to dismiss as against the original Amended and Supplemental Complaint and have implied a waiver of this defense on the part of the appellants. It is believed to be appropriate therefore, even though the question has not been raised as a point on appeal, to suggest to the Court that the question of jurisdiction be examined, as is the prerogative of any appellate court.

As stated under the Supplementary Factual Statement (*supra*), there is no authority for this action against individual defendants under 12 U.S.C.A. 1464-(d)(1). The reciprocal right to bring suit found in that section (Appendix A to the Bank Board brief) is between the association and the Bank Board. The association recognized the fact in paragraph XII of the

Amended and Supplemental Complaint [Tr. p. 40] where they stated:

> "It does not appear, however, that they have any standing to initiate an action pursuant to 12 U.S.C. §1464(d)(1) as parties plaintiff."

This reference was made in regard to the Lytton and Webb individuals.

Secondly, there is no federal question involved in this litigation and none has ever been urged.

Thirdly, there is no diversity of citizenship because the association is organized under the laws of the State of California and the individual parties defendant are all citizens and residents of the State of California.

Lastly, there is and can be no pendent jurisdiction existing under the association's Amended and Supplemental Complaint as to the Webbs because the federal law cause of action is against the Bank Board and the state law cause of action is against the Webbs. Therefore, there is no dual statement of federal and state causes of action against the same defendant arising out of a single claim. This is a requirement for pendent jurisdiction as set forth in the leading case of *Hurn v. Oursler* (1933), 289 U.S. 238, 58 S. Ct. 586, 77 L. Ed. 1148.

In *Hurn* the court set a double criteria for pendent jurisdiction by stating (1) the federal claim must not be "plainly wanting in substance" and (2) the federal and nonfederal claims must be but different grounds asserted to support a "single cause of action". Here,

it cannot be contended that the federal claims (against the Bank Board by the Association), and the state law claim against the Lyttons and Webbs are part of a "single cause of action." Not only are there different defendants, but the relief asked against them is entirely different. The Amended and Supplemental Complaint makes it clear that the association had a dispute with the Bank Board but had no dispute with the Webb defendants.

This Court followed the *Hurn* rule in *Pursche v. Atlas Scraper & Engineering Co.,* 9th Cir. (1962), 300 F. 2d 467, 483, where the court approved "considerable overlap in their factual basis" and distinguished *Dubil v. Rayford Camp Co.,* 9th Cir. (1950), 184 F. 2d 899, where the operative facts were found to be different.

Likewise, there is no question of there being any ancillary jurisdiction because, as this Court stated in *Glens Falls Indemnity Company v. United States,* 9th Cir. (1950), 229 F. 2d 370, ancillary jurisdiction arises under a cross-claim under Rule 13 or a third party claim under Rule 14 (and therefore cannot arise in a complaint).

Standing of Appellants to Appeal.

The appellees Lytton devote most of their brief in reurging the previously argued Motion to Dismiss directed to this appeal on the ground that the appellants have no standing in this Court to appeal the decision of the District Court dismissing out the other co-

defendants. The appellants believe that that matter has been fully argued in the briefs heretofore submitted and that no further argument on this question is necessary at this time.

Conclusions.

It is respectfully submitted that for the reasons herein urged (1) these appellants should be dismissed from the action or (2) the judgment dismissing the Lytton defendants should be set aside and the parties returned to their respective positions in the litigation as they existed prior to the Judgment of Dismissal.

Respectfully submitted,

POLLOCK & DEUTZ,
JOHN P. POLLOCK,
MAX F. DEUTZ,
By MAX F. DEUTZ,
Attorneys for Appellants.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN P. POLLOCK